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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
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10 UNITED STATES OF AMERICA,)
11 vs.) Plaintiff,) Case No. 2:04-cr-00498-PMP-GWF
12))
13 DANNY DARNELL JONES,) **FINDINGS & RECOMMENDATIONS**
14) Defendant.)
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16 This matter is before the Court on Defendant's Motion to Dismiss (#46), filed on August 14,
17 2006; the Government's Opposition to Defendant's Motion to Dismiss Indictment (#55), filed on August
18 25, 2006; and Defendant's Reply to Government's Opposition to Defendant's Motion to Dismiss (#57),
19 filed on August 31, 2006. The Court heard this matter on September 13, 2006.

20 Defendant Danny Darnell Jones moves to dismiss the indictment in this case on grounds that his
21 right to a speedy trial have been denied in violation of the Speedy Trial Act, 18 U.S.C. § 3164, the
22 Interstate Agreement on Detainers Act (IADA) and the Fifth and Sixth Amendments of the United States
23 Constitution.

24 **FACTS**

25 The indictment in this case was filed on December 22, 2004 charging Defendant with being a
26 felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). The Indictment
27 alleges that on or about October 31, 2004, the Defendant, a previously convicted felon, was in
28 possession of 9 mm firearm. A warrant for Defendant's arrest on the Indictment was issued on

1 December 22, 2004 and was received by the United States Marshall on that date. *Defendant's Motion*
 2 (#46), *Exhibit "1" and "1-A"*.

3 According to Defendant's Motion, he was arrested in Las Vegas, Nevada on October 31, 2004 on
 4 the charge of ex-felon in possession of a firearm and also on an outstanding warrant for an absconding
 5 charge from the State of California. Following his arrest, Defendant was held in the Clark County
 6 Detention Center until December 9, 2004 when he was transferred to the custody of California
 7 authorities. Defendant was thereafter held in custody on California state parole violation charges until
 8 January 12, 2005 when he was released.

9 On February 2, 2005, Defendant was again arrested by California law enforcement officers on a
 10 local California warrant pursuant to California Penal Code § 270 for failure to pay child support.¹ The
 11 Jail Custody Record indicates that Defendant was booked into the Los Angeles County Jail on the
 12 misdemeanor warrant for which there was a \$15,000 bail amount and on the subject federal charge for
 13 felon in possession of a firearm for which there was no bail. *Motion (#46), Exhibit "2"*. On February 3,
 14 2005, an Order for Release was entered in the Superior Court of California, Los Angeles County that
 15 Defendant be released on the penal code charge. *Motion (#46), Exhibit "3"*. It appears, however, that
 16 the California authorities continued to hold Defendant in custody on a parole violation charge. Although
 17 no specific record of this parole hold has been submitted to the Court, Defendant has attached to his
 18 Motion a State Parole Release which indicates that on March 1, 2005 the state parole hold was removed
 19 and Defendant was instructed to report to the parole office on the day after his release. *Motion (#46),*
 20 *Exhibit "4."* It therefore appears that as of March 1, 2005, Defendant was no longer being held in
 21 custody by the California authorities on any state charges.

22 On March 9, 2005, the Government filed a petition for writ of habeas corpus *ad prosequendum*
 23 in this case stating that Defendant was in the custody of the Los Angeles County Sheriff's Department
 24 which had consented to the temporary release of the Defendant so that he could be present for his initial
 25 appearance and arraignment and plea on the indictment in this district on April 8, 2005, and for any
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 28 ¹Defendant claims that the officers who arrested him stated he would not have been arrested on
 the penal code violation, but for the existence of the federal arrest warrant on the Indictment.

1 proceedings thereafter. Exhibit "5" to Defendant's motion indicates that there was some communication
2 between the Los Angeles County Sheriff's Department and the United States Attorney or the United
3 States Marshal on March 10, 2005 that a writ was being obtained for Defendant's release to the custody
4 of the United States. The order granting the writ was filed on March 24, 2005. *See Petition for Writ of*
5 *Habeas Corpus ad prosequendum, Order (#4).*

6 According to a March 30, 2005 Memorandum sent by the United States Marshal Service to the
7 Los Angeles County Jail, Defendant and another jail prisoner were scheduled to be picked up by the
8 Marshal on April 1, 2005. *Motion (#46), Exhibit "6".* For reasons that are not clear, Defendant was not
9 picked up by the United States Marshal from the Los Angeles County Jail on April 1, 2005. An undated
10 memorandum apparently from the Los Angeles County Jail Records Watch Deputy to the Marshal's
11 Lead Detention Enforcement Officer states that Defendant was scheduled for pick-up on April 1, 2005,
12 "but for some unknown reason was not." *Motion (#46), Exhibit "6".* The memo requested that the
13 Marshal's office call and arrange for pick-up through the jail extradition unit.

14 At the hearing in this matter, the Deputy United Marshal for the District of Nevada, Greg Dewey,
15 testified that in July 2006, he reviewed the Marshal's Office's file in this case and corresponded with his
16 counterpart in the Central District of California. According to Marshal Dewey, the Marshal's office in
17 Los Angeles told the Marshal's office in Las Vegas that the Los Angeles County Jail refused to release
18 Defendant on April 1, 2005 because they were not through with him yet. Marshal Dewey testified that
19 based on his investigation, the other inmate who was scheduled for pick-up by the Marshal's service on
20 that date was picked up. Marshal Dewey testified that Defendant was subsequently picked up from the
21 Los Angeles County Jail (Sheriff's Department) by the Bureau of Alcohol, Tobacco and Firearms (ATF)
22 on July 19, 2005. Marshal Dewey testified that the legal basis for the ATF to pick up Defendant was the
23 warrant for his arrest on the indictment that was issued on December 22, 2004. Marshal Dewey testified
24 that Defendant was not picked up pursuant to the writ of habeas corpus *ad prosequendum* which was
25 never executed and which had expired by the time that the ATF picked up Defendant on July 19, 2005.

26 Defendant was taken before a United States Magistrate Judge in the Central District of California
27 on July 19, 2005 for an initial appearance in that district, at which time he was ordered to be transferred
28 to the District of Nevada. The Magistrate Judge in the Central District also ordered that Defendant be

1 detained as a risk of nonappearance. (#5). The Defendant's initial appearance and plea
2 on the Indictment before the Magistrate Judge in the District of Nevada occurred on August 5, 2005.
3 The Federal Public Defender's Office was appointed to represent Defendant and he entered a not guilty
4 plea to the indictment. The Court ordered that the Defendant be detained pending trial in this case on the
5 grounds that he poses a danger to the community and a risk of non-appearance. The Defendant has been
6 held in custody in this district since his arraignment on August 5, 2005.

7 Trial in this case was initially set for September 27, 2005. There have been several continuances
8 of the trial pursuant to stipulations to continue entered into by the Defendant's counsel and counsel for
9 the Government. The first stipulation and order to continue trial was entered on September 26, 2005 and
10 the trial was continued to December 5, 2005. *Stipulation and Order* (#13), filed on September 26, 2005.
11 The second stipulation and order to continue trial was entered on November 30, 2005 and the trial was
12 continued to February 6, 2006. *Stipulation and Order* (#17), filed on December 9, 2005. The third
13 stipulation and order to continue trial was entered on January 26, 2006 and the trial was continued to
14 May 22, 2006. *Stipulation and Order* (#20), filed on January 26, 2006.

15 On March 17, 2006, the Court granted Defendant's and the Federal Public Defender's request
16 that the Federal Public Defender's office be relieved of representing the Defendant in this action. The
17 basis for Defendant's and his counsel's request was a difference of opinion between them regarding the
18 filing of the instant motion.² On March 17, 2006, the Court appointed CJA panel counsel to represent
19 Defendant in this case.

20 The fourth stipulation and order to continue trial was entered on May 10, 2006 and the trial was
21 continued to August 14, 2006. *Stipulation and Order* (#32), filed on May 10, 2006. The fifth stipulation
22 and order to continue trial was entered on July 12, 2006 and the trial was continued to October 16, 2006
23 *Stipulation and Order* (#34), filed on July 12, 2006. On July 25, 2006, Defendant's appointed CJA
24 panel counsel moved to withdraw as Defendant's counsel, in part, due to disagreement with Defendant

26 ²While represented by the Federal Public Defender's Office, Defendant filed a motion in proper
27 person to dismiss the indictment for the reasons set forth in the instant motion. *Motion* (#23), filed on
28 February 23, 2006. On March 30, 2006, the Court denied Defendant's motion "without prejudice to
counsel for Defendant to renew the same if appropriate." *Order* (#28), filed March 30, 2005.

1 regarding the filing of the instant motion, and Defendant requested that he be permitted to represent
2 himself in this case. On July 27-28, 2006, after canvassing Defendant and his counsel regarding
3 counsel's request to withdraw and Defendant's desire to represent himself, the Court granted said
4 requests and appointed standby counsel to assist Defendant in this case. Defendant thereafter filed the
5 instant Motion to Dismiss (#46) on August 14, 2006.

6 **DISCUSSION**

7 Defendant raises several grounds in support of his Motion. Defendant contends that his right to a
8 speedy trial under the Speedy Trial Act, 18 U.S.C. § 3161(c)(1) has been violated. Second, Defendant
9 alleges that his right to a speedy trial within the time limits provided in the Interstate Agreement on
10 Detainers Act (IADA), 18 U.S.C. App. § 2, has been violated. Third, Defendant alleges that his right to
11 a speedy trial under the Sixth Amendment of the United States Constitution has been violated. Finally,
12 Defendant also appears to allege that his right to due process of law under the Fifth Amendment to the
13 United States Constitution has been violated.

14 **1. Whether Defendant's Rights Under the Speedy Trial Act Were Violated.**

15 The Speedy Trial Act, 18 U.S.C. § 3161(c)(1), states in pertinent part:

16 In any case in which a plea of not guilty is entered, the trial of a defendant
17 charged in an information or indictment with the commission of an offense
18 shall commence within seventy days from the filing date (or making
public) of the information or indictment, or from the date the defendant
19 has appeared before a judicial officer of the court in which such charge is
pending, whichever date last occurs. . . .

20 In this case, Defendant's initial appearance, arraignment and plea in the District of Nevada
21 occurred on August 5, 2005. The seventy day time period under the Speedy Trial Act commenced from
22 that date. *United States v. Palomba*, 31 F.3d 1456, 1462 (9th Cir. 1994). Defendant's trial was thereafter
23 set for September 27, 2005. The trial date was thereafter continued pursuant to stipulations by
24 Defendant's counsel and counsel for the Government and pursuant to Findings of Fact, Conclusions of
25 Law and Orders of the Court entered in accordance with 18 U.S.C. § 3161(h)(8)(A) and (B), which
26 periods of delay are excluded in computing the time in which the trial must commence.

27 As the Government states in its Opposition (#55), page 2, Defendant's grievance regarding his
28 detention in the state facility prior to his initial appearance and arraignment on the indictment is not

1 relevant to the time limits for commencing trial under 18 U.S.C. § 3161(c)(1). Although not specifically
 2 raised in Defendant's Motion, his argument that his rights under the Speedy Trial Act were violated and
 3 the indictment should be dismissed may be predicated on 18 U.S.C. § 3161(j)(1). This subsection of the
 4 Act provides that if the attorney for the Government knows that a person charged with an offense is
 5 serving a term of imprisonment in any penal institution, he shall promptly undertake to obtain the
 6 presence of the prisoner for trial or cause a detainer to be filed with the person having custody of the
 7 prisoner and request him to so advise the prisoner of his right to demand trial. Even if Defendant's
 8 Motion is construed as being brought under subsection (j)(1), a violation of that provision is not grounds
 9 for dismissal of the indictment under 18 U.S.C. § 3162(a). *See United States v. Valentine*, 783 F.2d
 10 1413, 1415-16 (9th Cir. 1986).

11 Defendant's Motion also vaguely invokes the provisions of 18 U.S.C. § 3161(b) which requires
 12 that the indictment be filed within 30 days from the date the defendant is arrested. Defendant was
 13 arrested by Nevada state authorities on October 31, 2004 and was thereafter transferred to the custody of
 14 California state authorities. There is no evidence that federal officials were even involved in his initial
 15 arrest. The 30-day time period under subsection (b) is not triggered unless there is a federal arrest.
 16 *United States v. Johnson*, 953 F.2d 1167, 1172 (9th Cir. 1992). Therefore, Defendant's argument under
 17 18 U.S.C. § 3161(b) is also without merit.

18 The Court finds that Defendant's rights under the Speedy Trial Act were not violated and his
 19 Motion to Dismiss on this basis should be denied.

20 **2. Whether the Indictment Must Be Dismissed Pursuant to the Interstate Agreement
 21 On Detainers Act.**

22 Defendant argues that the Indictment in this case must be dismissed pursuant to the Interstate
 23 Agreement on Detainers Act (IADA), 18 U.S.C. App. § 2. The Government argues, however, that a
 24 detainer was never lodged against Defendant by the United States and, therefore, the provisions of the
 25 IADA never became applicable. In this regard, the Government relies on *United States v. Mauro*, 436
 26 U.S. 340, 98 S.Ct. 1834, 56 L.Ed.2d 329 (1978), in which the Supreme Court held that a federal writ of
 27 habeas corpus *ad prosequendum* is not a detainer within the meaning of the IADA and does not trigger
 28 the application of the Agreement. *See also United States v. Woods*, 775 F.2d 1059 (9th Cir. 1985),

1 stating that pursuant to *Mauro* the federal government is not required to proceed pursuant to the IADA
2 when it wishes to obtain custody of a defendant who is in the custody of another member to the
3 Agreement. The government may forego lodging a detainer and seek to obtain custody by a writ of
4 habeas corpus *ad prosequendum*.

5 In *Mauro*, the defendants were produced to the federal authorities pursuant to a writ of habeas
6 corpus *ad prosequendum* and were taken to federal court for their initial appearances and arraignments.
7 The defendants were thereafter returned to state custody prior to their federal trial. Defendants argued
8 that their transfer back to state custody before their federal trial violated the “anti-shuttling” provisions
9 of Article IV(e) of the IADA. The Court rejected these arguments on the grounds that unlike a writ of
10 habeas corpus *ad prosequendum* issued by a federal district court, a detainer may be lodged against a
11 prisoner on the initiative of a prosecutor or law enforcement officer. A detainer merely puts the officials
12 of the institution in which the prisoner is incarcerated on notice that the prisoner is wanted in another
13 jurisdiction for trial upon his release from prison. Further action must be taken by the receiving state in
14 order to obtain the prisoner. The IADA was adopted by the states, including the United States, to correct
15 the abuses associated with delays in acting on detainees by requiring that the receiving state take action
16 within a specified time after the detainer is lodged to obtain custody of the defendant and bring him to
17 trial, and to also prohibit the receiving state from transferring the prisoner, without his consent, back to
18 the custody of the sending state before his trial.

19 Although the IADA contains no definition of the word “detainer” in holding that the federal writ
20 of habeas corpus *ad prosequendum* does not constitute a detainer within the meaning of the IADA,
21 *Mauro* states:

22 Because writs of habeas corpus *ad prosequendum* issued by a federal court
23 pursuant to the express authority of a federal statute are immediately
24 executed, enactment of the Agreement was not necessary to achieve their
25 expeditious disposition. . . . Contrary to the Court of Appeals in No. 76-
26 1596, it is not necessary to construe “detainer” as including these writs in
27 order to keep the United States from evading its duties under the
28 Agreement. When the United States obtains state prisoners by means of a
writ of habeas corpus *ad prosequendum*, the problems that the Agreement
seeks to eliminate do not arise; accordingly the Government is in no sense
circumventing the Agreement by means of the writ. We therefore
conclude that a writ of habeas corpus *ad prosequendum* is not a detainer
for purposes of the Agreement.

1 *Mauro, supra*, 436 U.S. 360-61.

2 In the companion case, *United States v. Ford*, 436 U.S. 340, 98 S.Ct. 1834, 56 L.Ed.2d 329
 3 (1978), the federal officials lodged a detainer against a defendant who was in state custody by means of
 4 sending the federal bank robbery warrant to the state prison authorities where defendant was serving a
 5 state sentence. The government thereafter obtained defendant's appearance in federal court for
 6 arraignment on the indictment pursuant to a writ of habeas corpus *ad prosequendum*. After defendant
 7 entered his plea, he was returned to state prison during which time his trial in federal court was
 8 continued on several occasions either at the request of the government or on the court's own initiative.
 9 Because of the existence of the detainer, defendant was denied furlough privileges while in state custody
 10 awaiting his federal trial. Although the Court in *Mauro* held that a writ of habeas corpus *ad*
 11 *prosequendum* does not constitute a detainer under the IADA, *Ford* held that once the federal
 12 government avails itself of the provisions of the IADA by lodging a detainer against the defendant with
 13 state authorities, the government becomes subject to the Agreement. In that circumstance, a
 14 subsequently issued writ of habeas corpus *ad prosequendum* will be treated as a written request for
 15 temporary custody of the defendant within the meaning of the IADA.

16 There is no evidence that federal officials, either formally or informally, lodged a detainer against
 17 Defendant with the Los Angeles County Sheriff's Department or other California authorities. Marshal
 18 Dewey testified at the hearing that the United States Marshal's Service never lodged a detainer against
 19 the Defendant. Marshal Dewey testified that the Marshal's Service uses certain forms to lodge
 20 detainers.³ He also testified that on occasion federal agencies may lodge a detainer against a defendant
 21 held in state custody by faxing or sending a copy of the federal arrest warrant to the state facility holding
 22 a defendant. No evidence has been presented, however, that any federal agency, or in particular the
 23 ATF, lodged a detainer against Defendant.

24 . . .

25 . . .

27 ³See *United States v. Johnson*, 196 F.3d 1000 (9th Cir. 1999), which discusses the Marshal's
 28 Service's detainer forms.

1 If a detainer is lodged, Article III(c) of IADA requires that the person having custody of the
2 prisoner promptly inform him of the source and contents of any detainer lodged against him and also
3 inform him of his right to make a request for final disposition of the indictment, information or
4 complaint on which the detainer is based. Article III(a) requires that the prisoner be brought to trial
5 within 180 days after he shall have caused to be delivered to the prosecuting officer and the appropriate
6 court a request for final disposition of the indictment, information or complaint. Article III(d) further
7 requires that the official having custody of the prisoner to forthwith notify the prosecuting officer and the
8 appropriate court of the prisoner's request for final disposition. *See United States v. Johnson*, 196 F.3d
9 1000 (9th Cir. 1999). It is possible that the state authorities could have failed to inform Defendant of the
10 existence of a federal detainer against him and of his right to request a speedy trial under the provisions
11 of the IADA. The absence of any such evidence, however, is also consistent with the conclusion that no
12 federal detainer was lodged against the Defendant such as to bring this case within the requirements of
13 the IADA.

14 The evidence establishes that on March 28, 2005 a writ of habeas corpus *ad prosequendum* was
15 issued and that the Marshal made arrangements with the Los Angeles County Sheriff's Department to
16 pick up Defendant from the Los Angeles County Jail on April 1, 2005 pursuant to the writ. The record
17 is unclear why Defendant was not picked up by the Marshal's Service on that date. Marshal Dewey
18 testified, based on hearsay information obtained from the Marshal's Office in the Central District of
19 California, that when the Marshal attempted to pick up the Defendant on April 1, 2005, the Jail
20 authorities advised the Marshal that they would not release Defendant because "they were not through
21 with him." The records submitted by Defendant indicate, however, that he was no longer being held on
22 state charges on April 1, 2005. According to Exhibit "7" to Defendant's Motion (#46), the Los Angeles
23 County Sheriff's Department sent a memo to the Marshal's Service stating that Defendant was scheduled
24 for pick-up on April 1, 2005, but that for some reason Defendant was not picked up. The memo
25 requested that the Marshal's Service call and make arrangements to pick up Defendant. Marshal Dewey
26 did not testify whether the Marshal's Service received the memorandum attached to Defendant's Motion
27 as Exhibit "7". Nor did he indicate that the Marshal's Service made any subsequent effort after April 1,
28 2005 to pick up the Defendant so that he could be brought to the Court for his initial appearance and

1 arraignment on the indictment. According to Marshal Dewey, based on his review of the Marshal's
 2 records, Defendant was picked up from the Los Angeles County Jail on July 15, 2005 by the ATF
 3 pursuant to the federal arrest warrant.

4 Thus, contrary to the Supreme Court's statement in *Mauro, supra*, the writ of habeas corpus *ad*
 5 *prosequendum* issued for Defendant's custody in this case did not have the immediate effect
 6 contemplated by the writ. It also appears that Defendant may have been held in custody by the Los
 7 Angeles County Jail after March 1, 2005 absent any state law grounds for holding him in custody. There
 8 is, however, no evidence that federal authorities lodged a detainer against the Defendant which made the
 9 provisions of the IADA applicable. Accordingly, the Court finds that Defendant was not denied his right
 10 to a speedy trial under the provisions of the IADA.

11 **3. Whether Defendant's Sixth Amendment Right to A Speedy Trial Was Violated.**

12 “*The Sixth Amendment guarantees that in all criminal prosecutions the accused shall enjoy a*
 13 *right to a speedy trial.*” *United States v. Beamon*, 992 F.2d 1009, 1012 (9th Cir. 1993), quoting *Doggett*
 14 *v. United States*, 505 U.S. 647, 651, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992). Speedy trial challenges
 15 are subject to a four part inquiry governed by *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d
 16 101 (1972). Those four factors are: (1) whether the delay before trial was uncommonly long, (2)
 17 whether the government or the defendant is more to blame for the delay, (3) whether, in due course, the
 18 defendant asserted his right to a speedy trial, and (4) whether he suffered prejudice because of the delay.
 19 *United States v. Beamon, supra, citing Doggett*, 505 U.S. at 651, 112 S.Ct. at 2690; *United States v.*
 20 *Turner*, 926 F.2d 883, 889 (9th Cir.), *cert. denied*, 502 U.S. 830, 112 S.Ct. 103, 116 L.Ed.2d 73 (1991).

21 As the Court in *Doggett* held, the first factor, delay, is analyzed in two steps. To trigger a speedy
 22 trial inquiry, the defendant must first show that the period between indictment and trial passes a
 23 threshold point of “presumptively prejudicial” delay. If this threshold is not met, then the court does not
 24 proceed further to analyze the *Barker* factors. If the threshold showing is made, the court considers the
 25 extent to which the delay exceeds the threshold point in light of the degree of diligence by the
 26 government and the acquiescence by the defendant to determine whether sufficient prejudice exists to
 27 warrant relief. *Doggett* noted that lower courts have generally found post-accusation delay
 28 “presumptively prejudicial” at least as it approaches one year. *Doggett, supra*, 505 U.S. at 654, n.1. In

1 *Beamon*, the court cited a Second Circuit decision, *United States v. Vassell*, 970 F.2d 1162, 1164 (2d.
2 Cir.), *cert. denied* 506 U.S. 1009, 113 S.Ct. 627, 121 L.Ed.2d 559 (1992), which suggests that there is
3 general consensus of about eight months. In *United States v. Tanh Huu Lam*, 251 F.3d 852, 856 (9th
4 Cir. 2001), the court also stated that in this circuit the court has found that a delay of six months in a case
5 involving a single count of firearms possession by a convicted felon constitutes a “borderline case” for
6 “presumptively prejudicial” delay. *See United States v. Valentine*, 783 F.2d 1413 (9th Cir.1986). In this
7 case, Defendant was indicted on December 22, 2004 and his trial is presently scheduled to commence on
8 October 16, 2006. The length of delay in this case, therefore, passes the threshold for “presumptively
9 prejudicial” delay to require the Court to evaluate the other *Barker* factors.

10 The Court therefore turns to the second *Barker* factor regarding whether the Government or the
11 Defendant is more to blame for the delay and whether the Government was guilty of negligence or more
12 serious misconduct in failing to diligently obtain Defendant’s custody so that he could be arraigned on
13 the indictment and brought to trial. In *Doggett, supra*, there was an extraordinary delay of eight years
14 between the indictment and defendant’s arrest. The defendant, who was unaware of the indictment, left
15 the United States shortly after it was filed. The government subsequently learned that defendant was in
16 custody in Panama and requested that Panama expel the defendant to the United States once the Panama
17 proceedings had run their course. Instead, Panama released defendant without notifying the United
18 States. Defendant first went to Columbia and then returned to the United States two and half years after
19 the indictment. Defendant, allegedly still ignorant of the indictment, settled in the United States. During
20 the ensuing years, the government made no attempt to determine defendant’s whereabouts until the
21 Marshal’s Service ran a credit check on persons subject to outstanding warrants and located defendant
22 six years after he had returned to the United States and eight and one-half years after the indictment was
23 filed. Based on this record, the Court affirmed the district court’s finding that the government was
24 negligent in failing to diligently pursue defendant’s arrest on the indictment.

25 In this case, a much shorter period of approximately seven months passed between Defendant’s
26 indictment and his initial appearance and arraignment on August 5, 2005. At the time the indictment
27 was filed, Defendant was apparently still in the custody of the Los Angeles County Sheriff following his
28 arrest in Las Vegas on October 31, 2004 and his transfer to the custody of California authorities on

1 December 9, 2004. Defendant remained in state custody until his release on January 12, 2005.
2 Defendant claims that he was unaware of the existence of the federal indictment and arrest warrant until
3 his arrest by state authorities on February 2, 2005.

4 No information has been provided as to when the Government first learned that Defendant was
5 in state custody following his arrest on February 2, 2005. The Government was aware by early March,
6 2005 that Defendant was in the Los Angeles County Jail, and on March 9, 2005, the Government filed
7 the petition for writ of habeas corpus *ad prosequendum* to obtain the temporary release of Defendant so
8 that he could be present for his initial appearance and arraignment on April 8, 2005. Pursuant to this
9 writ, the United States Marshal's Service arranged to pick up Defendant from the Los Angeles County
10 Jail on April 1, 2005. As discussed previously, Marshal Dewey gave hearsay testimony that the United
11 States Marshal was informed by the County Jail on April 1, 2005 that it refused to release the Defendant.
12 Marshal Dewey also testified that the Marshal picked up another prisoner on April 1, 2005 which
13 provides some credence to the Government's assertion that the Marshal's Service did not cancel the
14 pick-up or simply fail to retrieve the Defendant.

15 Defendant's Exhibit "7", however, indicates that the Sheriff's Department sent a follow-up
16 memo to the Marshal's Service requesting that it call and arrange to pick up Defendant. There is no
17 evidence that the Marshal made further efforts to pick up Defendant after April 1, 2005 and the
18 Government did not seek another writ to obtain custody of the Defendant. Defendant claims that there
19 were numerous other communications between the Los Angeles County Jail and federal authorities in
20 regard to having the Government take custody of the Defendant. Other than Defendant's assertion,
21 however, no evidence has been presented to confirm such communications. Defendant was finally taken
22 into custody by the ATF on July 19, 2005 for his initial appearance before the United States Magistrate
23 in the Central District of California.

24 On this record, the Court finds that the Government was negligent in failing to obtain custody of
25 the Defendant from the Los Angeles County Jail or Sheriff's Department after April 1, 2005 until he was
26 arrested by the ATF and taken into federal custody on July 19, 2005. Arguably, there may have also
27 been some lack of diligence by the Government before April 1, 2005 in seeking to obtain custody of
28 Defendant to present him for an initial appearance. The Government's delay in obtaining custody of

1 Defendant, however, does not rise to the level of bad faith. The Government made an effort to obtain
2 Defendant's custody through the writ of habeas corpus *ad prosequendum*, and it appears that the failure
3 to secure his custody on April 1, 2005 was caused by miscommunication within the Sheriff's
4 Department or between the Sheriff's Department and the Marshal's Service. The subsequent failure of
5 the Government to obtain Defendant's custody until July 19, 2005 appears to be the result of lack of
6 diligence rather than a conscious or deliberate decision to delay obtaining custody of the Defendant.

7 Defendant cannot be charged with any responsibility for the delay between his indictment on
8 December 22, 2004 and his initial appearance in this District on August 5, 2005. There is no evidence
9 that Defendant knew of the indictment prior to his arrest on February 2, 2005, and he cannot be faulted
10 for the Government's failure to promptly obtain his custody from state authorities so that he could be
11 present for an initial appearance and arraignment.

12 Under the third *Barker* factor, the Court is required to consider whether, in due course, the
13 Defendant asserted his right to a speedy trial. Although a defendant's failure to demand a speedy trial
14 does not constitute a waiver of his Sixth Amendment right, it is one factor to be considered in regard to
15 whether he has been deprived of his right to a speedy trial. *Barker v. Wingo, supra*, 407 U.S. at 528. At
16 Defendant's initial appearance in this District on August 5, 2005, the Federal Public Defender was
17 appointed to represent him. Trial was thereafter set for September 27, 2005. Defendant's Public
18 Defender thereafter entered into three stipulations with the Government to continue the trial date which
19 were granted by the Court. In February 2006, Defendant filed his own motion in proper person to
20 dismiss the indictment based on the alleged denial of his right to a speedy trial.

21 In March 2006, Defendant's Public Defender was permitted to withdraw because of the
22 disagreement between her and Defendant regarding the appropriateness of filing the instant motion. On
23 March 17, 2006, the Court appointed new counsel to represent Defendant and that counsel also entered
24 into two subsequent stipulations with the Government to continue the trial date that were approved by
25 the Court, the last of which set trial for its present date of October 16, 2006. Defendant's second counsel
26 was also permitted to withdraw on July 28, 2006, again in part due to the disagreement between counsel
27 and the Defendant regarding the filing of the instant motion. Defendant's request to represent himself in
28 this matter was granted on July 28, 2006 and he thereafter filed the instant Motion.

1 In *Barker v. Wingo, supra*, the Court held that the defendant's counsel's agreement to
2 postponements of the trial date was a significant factor weighing against defendant's claim that his right
3 to a speedy trial was denied. In *United States v. Tanh Huu Lam*, 251 F.3d 852, 857-58 (9th Cir. 2001),
4 the court held that the responsibility of defendant's counsel for delays or continuances rightfully accrues
5 to the defendant. The court stated that although there are basic rights which the attorney cannot waive
6 without the fully informed and publicly acknowledged consent of the client, the lawyer has – and must
7 have – full authority to manage the conduct of the trial. The court in *Tanh Huu Lam* further noted that
8 the defendant never moved to substitute counsel or dismiss the indictment prior to trial. The court also
9 found that the defense counsel's requests for the continuances were legitimate and benefitted the
10 defendant by providing counsel additional time to prepare.

11 In this case, both of Defendant's attorneys stipulated to continuances of the trial date and
12 represented in the stipulations that Defendant agreed to the continuances. Although there was
13 disagreement between Defendant and his former counsel regarding their decisions not to file a motion to
14 dismiss the indictment, there is no evidence that Defendant objected to continuing the trial date. It is
15 apparent that, contrary to the judgment of his attorneys, Defendant wanted to litigate his motion to
16 dismiss before proceeding to trial. The Court finds that former counsel's refusal to file the instant
17 motion to dismiss or their stipulations to continue the trial on his behalf were not unreasonable and does
18 not support a finding that prior counsel was incompetent. The adverse weight against Defendant because
19 of his agreement to the continuances of the trial is arguably moderated, to some degree, based on his
20 disagreement with his counsel regarding the filing of his motion to dismiss. There is, however, no
21 information that the Government sought any of the continuances of the trial date.

22 The fourth factor under *Barker* is whether Defendant suffered prejudice because of the delay.
23 *Barker* states that prejudice should be assessed in light of the interests of defendants which the speedy
24 trial right was designed to protect. The Court identified three such interests: (i) to prevent oppressive
25 pre-trial incarceration, (ii) to minimize anxiety and concern of the accused, and (iii) limit the possibility
26 that the defense will be impaired. *Barker* states that this last interest is the most serious because the
27 inability of a defendant to adequately prepare his case skews the fairness of the entire system. *Barker v.*
28 *Wingo, supra*, 407 U.S. at 532. *See also Doggett v. United States, supra*, 505 U.S. at 654.

1 *Doggett* noted that proving that unreasonable delay actually impaired defendant's ability to
 2 present a defense is difficult because delay may work to the benefit or detriment of either side because of
 3 lost witnesses, failed memory or other circumstances. *Doggett* stated that such prejudice must be
 4 evaluated in light of whether the delay was caused by official negligence or bad faith. In regard to delay
 5 caused by official negligence, the Court stated that “[w]hile not compelling relief in every case where
 6 bad-faith would make relief virtually automatic, neither is negligence automatically tolerable simply
 7 because the accused cannot demonstrate exactly how it has prejudiced him.” *Doggett, supra*, 505 U.S.
 8 657. The Court in that case found no difficulty in holding that the government's six year delay in
 9 arresting defendant after he returned to the United States was sufficient to find that defendant's defense
 10 was prejudiced by the delay and that the indictment should be dismissed.

11 Here, the Defendant suffered prejudice because he was detained in state custody prior to his
 12 arraignment for a period longer than would have been necessary if the Government had acted diligently
 13 to obtain his custody. Although Defendant reasonably should have been taken into federal custody prior
 14 to August 5, 2005, it is likely that Defendant would still have been ordered detained by the federal court
 15 if his initial federal appearance had occurred earlier.⁴ Given the length of the delay in presenting the
 16 Defendant to the Court for arraignment, which was caused by negligence rather than a deliberate or bad
 17 faith delay by the Government, the Court finds that this delay was not sufficient to hold that Defendant's
 18 right to a speedy trial under the Sixth Amendment was violated or that the indictment should be
 19 dismissed.

20 The delay caused by the Government's negligence in obtaining custody of Defendant so that he
 21 could be arraigned on the indictment lasted approximately four months from when the Defendant
 22 reasonably should have been taken into federal custody and brought before the Court to be arraigned. If
 23

24 ⁴The Sheriff's Department should have released Defendant from state custody once there were
 25 no state charges pending against him. There is no evidence, however, that the Government knew that
 26 the Sheriff's Department kept Defendant in custody solely because of the federal indictment and
 27 warrant which, as the Court has found, was not lodged as a detainer. Therefore, while Defendant may
 28 have a legitimate complaint against the Los Angeles County Sheriff's Department for wrongfully
 detaining him after March 1, 2005, the Government is not responsible for this allegedly wrongful
 conduct.

1 Defendant had exercised his right to a speedy trial, he would have proceeded to trial on September 27,
2 2005. The total length of time from indictment to trial, at that point, would have been nine months
3 which would have arguably been close to the borderline of presumptive prejudicial delay. *See United*
4 *States v. Beamon*, 992 F.2d 1009, 1012 (9th Cir. 1993). The trial date was thereafter postponed pursuant
5 to stipulations made by Defendant's counsel and there is no evidence that these continuances were
6 sought at the behest of the Government. Considering all of the factors and circumstances, the delay in
7 this case was not so long that prejudice to Defendant's ability to defend the case should be presumed.

8 Defendant has not demonstrated to the Court that the delay in this matter has caused actual
9 prejudice in Defendant's ability to present a defense to the indictment. At the hearing in this matter,
10 Defendant claimed for the first time that a witness who will support his defense to the charge of being an
11 ex-felon in possession of a firearm is no longer available to testify on his behalf. The Court finds
12 Defendant's argument in this regard, which was not presented in his Motion, is not credible. The Court
13 therefore, finds that there is no evidence that Defendant's ability to defend against the charge against him
14 has been actually prejudiced.

15 **4. Whether Defendant's Due Process Rights Under the Fifth Amendment Have Been**
16 **Violated.**

17 Defendant does not clearly assert, nor is there any basis to find, that there was any excessive pre-
18 indictment delay in this case. As set forth above, Defendant was arrested by local or state authorities in
19 Las Vegas on October 31, 2004, at which time he was allegedly found to be in possession of a firearm.
20 The indictment in this case was filed on December 22, 2004, less than two months after the alleged
21 offense occurred. On its face, there does not appear to be any excessive delay between the commission
22 of the alleged offense and the filing of the indictment. To establish a Fifth Amendment violation, the
23 defendant must show that he suffered "actual non-speculative prejudice from the delay and that the
24 delay, when weighed against the government's reasons for it, offends those fundamental conceptions of
25 justice which lie at the base of our civil and political institutions." *United States v. Gregory*, 322 F.3d
26 1157, 1165 (9th Cir. 2003). Where the delay results from the government's negligence, rather than
27 reckless or intentional governmental misconduct, the showing of actual prejudice must be even greater.
28 Here, the period of pre-indictment delay was not excessive. To the extent that the post-indictment delay

1 is analyzed under the Fifth Amendment, the Court again concludes that the delay prior to arraignment
2 resulted from the Government's negligence and not from reckless or intentional misconduct. Defendant
3 has not shown actual prejudice to his defense that would support a dismissal of the indictment under the
4 Fifth Amendment.

5 **CONCLUSION**

6 The Court concludes that Defendant's rights under the Speedy Trial Act were not violated. The
7 Court further finds that the Interstate Agreement on Detainers Act is inapplicable in this case because no
8 federal detainer was lodged against the Defendant. The Court further finds that Defendant was subjected
9 to delay between his indictment on December 22, 2004 and his arraignment on August 5, 2005 and
10 suffered some prejudice through a longer period of pre-trial incarceration than would likely have
11 occurred had the Government more diligently sought to obtain custody from the state officials and
12 presented him for his initial federal appearance and arraignment. The delay caused by the Government
13 was the result of negligence, however, and was not intentional or done in bad faith. Subsequent to his
14 arraignment, the continuances of the trial date were made with the consent of the Defendant and his
15 counsel. The length of delay in this case was not so substantial or the result of egregious governmental
16 conduct to constitute a violation of Defendant's Sixth Amendment rights. Defendant's right to due
17 process under the Fifth Amendment was not violated.

18 **RECOMMENDATION**

19 **IT IS RECOMMENDED** that Defendant's Motion to Dismiss (#46) be DENIED.

20 **NOTICE**

21 Pursuant to Local Rule IB 3-2, any objection to this Finding and Recommendation must be in
22 writing and filed with the Clerk of the Court within ten (10) days. The Supreme Court has held that the
23 courts of appeal may determine that an appeal has been waived due to the failure to file objections within
24 the specified time. *Thomas v. Arn*, 474 U.S 140, 142 (1985). This circuit has also held that (1) failure to
25 file objections within the specified time and (2) failure to properly address and brief the objectionable
26 issues waives the right to appeal the District Court's order and/or appeal factual issues from the order of
27 . . .
28 . . .

1 the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991); *Britt v. Simi Valley United*
2 *Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

3 DATED this 21st day of September, 2006.

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6 GEORGE FOLEY, JR.
7 UNITED STATES MAGISTRATE JUDGE

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